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1 EDWARD NECARSULMER, III
2 materiality standards or SEC disclosure
3 standards, it's based in the reasonableness of
4 the investigation?

5 A. Yes.

6 Q. And nothing else?

7 MR. GLUCKOW: Objection to the
8 form.

9 The report speaks for itself. I
10 don't know if you want to engage in any
11 dialog on this.

12 In the conclusion section here,
13 the last section on Page 2, Summary
14 Number 4, it talks about both the
15 reasonableness of the investigation and
16 the reasonableness of the belief. If
17 you want to lump that all into the
18 reasonableness of the investigation,
19 that's fine. I just don't want there
20 to be an unclear record; that there's
21 clearly at least two pieces of it in
22 terms of the written opinion.

23 BY MR. LEWIS:

24 Q. Let me back up a different way.

25 In a case in which a problem

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1 EDWARD NECARSULMER, III
2 this thing is out there, they decided
3 it wasn't significant to the company's
4 sales and earnings, and then they
5 decided to move on, I would support
6 that, I think that's -- I think that's
7 proper.

8 BY MR. LEWIS:

9 Q. And if that happened, do you
10 believe that excuses the company from any
11 disclosure obligation?

12 MR. GLUCKOW: Objection to the
13 form. Outside the scope of the
14 opinion. He's not offering any expert
15 testimony as to the company's
16 disclosure obligations; he's offering
17 expert testimony with respect to the
18 underwriters' investigation and the
19 reasonableness of the underwriters'
20 beliefs in light of that investigation.

21 BY MR. LEWIS:

22 Q. Well, let me back up and ask
23 that question, and that is at the heart of what
24 my question is about. Does your opinion in any
25 way purport to address the company's disclosure

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1 EDWARD NECARSULMER, III
2 exists, the underwriters conduct a diligent
3 investigation, and notwithstanding having
4 conducted an investigation in full accordance
5 with reasonable industry standards, the
6 problem is still out there and it's not
7 disclosed in the prospectus or registration
8 statement and the problem then thereafter
9 bites the company, are you saying that the
10 underwriters have no disclosure obligation
11 because they conducted a reasonable
12 investigation?

13 MR. GLUCKOW: The same objections
14 as before. Incomplete hypothetical.
15 It calls for speculation. It calls for
16 a legal conclusion. Incomplete
17 hypothetical. Assumes facts not in
18 evidence.

19 You can answer.

20 THE WITNESS: I mean, here's what
21 I would say. I would say that to the
22 extent that the underwriters made a
23 reasonable and diligent investigation,
24 they discovered -- and in this
25 investigation they discovered whatever

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1 EDWARD NECARSULMER, III
2 obligation, to your knowledge?

3 A. No, I wasn't asked -- it's not
4 within the scope of my assignment.

5 Q. And your opinion with respect to
6 disclosure such as it is relates only to the
7 underwriters' disclosure obligations, is that
8 fair?

9 MR. GLUCKOW: Objection to the
10 form. It's not the underwriters'
11 disclosure obligations; it's the
12 underwriters' investigation and the
13 reasonableness of their belief in the
14 accuracy and completeness of the
15 registration statement.

16 I'm not sure what you're getting
17 at with your parsing disclosure
18 obligations of the company --

19 MR. LEWIS: I'm sitting here and
20 letting you filibuster, but you can
21 object to the questions, and you have,
22 and you've done it fully, on this whole
23 subject matter. You don't have to
24 supply what his opinion is about. He
25 knows what his opinion is about, and he

25 (Pages 94 to 97)

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1 EDWARD NECARSULMER, III
2 can tell me that, he can correct me,
3 but --

4 MR. GLUCKOW: I just think your
5 question is inherently misleading, and
6 I'm trying to make sure that both I and
7 the witness understand what it is you
8 are trying to ask.

9 BY MR. LEWIS:

10 Q. Let's look at Paragraph F of
11 your rebuttal report, Exhibit 322.

12 You write, starting in the
13 second sentence of Paragraph F: "While
14 Ochoa's report is not clear on this point,
15 although underwriters often review filings of
16 other companies in the same industry, as they
17 did here, the mention of a risk in such
18 filings is not necessarily determinative of
19 whether the risk needs to be included in the
20 issuing company's registration statement."

21 Can you explain what you mean
22 by that?

23 A. Sure.

24 What I'm saying is basically
25 that it's certainly good practice to look at

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1 EDWARD NECARSULMER, III
2 what the competition is doing, what they are
3 filing, the most recent, whatever, 10-K,
4 whatever they are filing with the SEC. The
5 fact that you see something doesn't
6 necessarily mean that it's a requirement to be
7 included in either your documents or in your
8 opinion.

9 I guess what I'm trying to say
10 in a broader sense is there's a huge body of
11 information out there, both things you learn
12 from the company and the things you might
13 learn from the industry and whatever else, and
14 when it comes down to it, the underwriter's
15 job is to go through those things and make a
16 decision as to what is material and what is
17 not.

18 Q. You went on to say: "Each
19 factual situation is different and the
20 underwriters must evaluate appropriate
21 disclosure on an individual basis," correct?

22 A. Correct.

23 Q. Would it be fair to say that
24 your position is that because gray marketing
25 affects different companies in different ways,

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1 EDWARD NECARSULMER, III
2 each case has to be separately evaluated?

3 MR. GLUCKOW: Objection to the
4 form. Vague and ambiguous.

5 You can answer.

6 THE WITNESS: I think that's
7 fair.

8 BY MR. LEWIS:

9 Q. After the due diligence
10 investigation in the Daimler case that you
11 mentioned, did gray marketing later affect the
12 results of Daimler-Benz?

13 A. No, or not to my knowledge.

14 I... Not to my knowledge.

15 Q. What information do you
16 understand the underwriters received from Adams
17 itself about gray marketing or Costco by the
18 time of the effective date of the IPO?

19 A. They -- they -- you know,
20 there's a number of items. They knew that an
21 action -- I'm not sure of the name for it and if
22 action is the right word for it, but there had
23 been a legal challenge. I think they had
24 records from talking to marketing people, you
25 know, that they had discussed it. Certainly

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1 EDWARD NECARSULMER, III
2 Lehman in deposition, I believe from
3 Pulido-Crowe, they discussed whether they should
4 talk to Costco. Those are the types of things.

5 Q. Do you think that Lehman should
6 not have talked to Costco because Barney Adams
7 purportedly stated that it was unnecessary to do
8 so?

9 MR. GLUCKOW: Objection to the
10 form. Calls for speculation.
11 Incomplete hypothetical.

12 You can answer.

13 THE WITNESS: I think probably
14 not necessarily. I think there's
15 another problem with talking to the
16 Costcos of the world, is you don't
17 normally -- it's pretty hard -- almost
18 by definition of who they are, they are
19 not going to tell you anything, and
20 that is part of their MO which is
21 relatively well-known. So whether they
22 are right for that reason or right
23 because that's what they heard from
24 Adams, I don't -- I think, it's my
25 opinion, that they were adequate in

26 (Pages 98 to 101)

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1 EDWARD NECARSULMER, III
2 what they did.
3 BY MR. LEWIS:
4 Q. Do you agree that it would have
5 been better to try calling Costco to see what
6 could be found, if anything?
7 A. I don't know that hindsight is
8 particularly useful for me in this case.
9 Q. Well, if you apply it, with the
10 benefit of hindsight, do you think it would have
11 been a better thing to do?
12 MR. GLUCKOW: Objection. Asked
13 and answered.
14 You can answer it now.
15 THE WITNESS: I still don't think
16 they would have found anything
17 significant.
18 BY MR. LEWIS:
19 Q. Now, you referred in Paragraph C
20 of your rebuttal report to the underwriters
21 having conducted 11 telephonic interviews.
22 Let me show you Exhibit 198.
23 MR. LEWIS: I'm sorry; this says
24 160, is it not?
25 MR. GLUCKOW: 160.

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1 EDWARD NECARSULMER, III
2 THE WITNESS: Mine says 198.
3 BY MR. LEWIS:
4 Q. They were marked -- the same
5 document was marked several times. Just so we
6 are all looking at the same thing, you have in
7 front of you one numbered 160?
8 A. I gave you back 198, which I
9 had.
10 Q. Okay.
11 A. Now I have 160.
12 Q. Were the 11 calls that you
13 referred to in your rebuttal report the 11 calls
14 that are enumerated on the second page of this
15 exhibit under the heading of Customer Calls,
16 summaries circulated to underwriters by caller
17 and supplier calls?
18 A. That is correct.
19 Q. Do you know if any of these
20 calls were selected by the underwriters to be
21 made on a geographic basis?
22 A. I don't.
23 Q. Do you know how the calls were
24 selected to be made?
25 A. It -- what -- how this list was

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1 EDWARD NECARSULMER, III
2 compiled; is that the question?
3 Q. Not how the list was compiled,
4 but how when the customer calls were made by the
5 underwriters, the underwriters figured out who
6 they were going to call?
7 MR. GLUCKOW: And which
8 underwriters are going to call which
9 party, or...?
10 Objection to form.
11 THE WITNESS: I'm not sure.
12 BY MR. LEWIS:
13 Q. Well, Adams had a large universe
14 of suppliers; is that fair to say?
15 A. Yes.
16 Q. And it had a large universe of
17 customers also, correct?
18 A. Correct.
19 Q. Do you know how the underwriters
20 made the determination of which customers they
21 would call?
22 A. A list was provided by the
23 company.
24 Q. Was that based on the size of
25 the customers' business with Adams?

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1 EDWARD NECARSULMER, III
2 A. I don't know for sure, but I
3 assume so. That is traditionally the way it is
4 done.
5 Q. Traditionally which -- what
6 level of customers of a company does an
7 underwriter call in due diligence?
8 A. There's no magic to this, but
9 traditionally, you know, you say, "Give me your
10 top ten customers." It could be out of the top
11 50, the top five, but the top ten sticks in my
12 memory.
13 Q. Is that a practice you have used
14 yourself?
15 A. Yes, it is.
16 Q. I'll show you what's previously
17 been marked as Exhibit 162. Was this one of the
18 documents that you reviewed in your work on this
19 case?
20 A. It was.
21 Q. Did you see in reviewing it that
22 on the right-hand column of the page for a
23 period of 1998, the firm of WDC Mackenzie,
24 M-A-C-K-E-N-Z-I-E, was listed as the third
25 largest customer of Adams?

27 (Pages 102 to 105)

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A. I do.

Q. Do you believe that there was any reason why the underwriter should not have called Mackenzie in the due diligence process?

MR. GLUCKOW: Objection to the form. Mischaracterizes the document in the record.

You can answer.

BY MR. LEWIS:

Q. Let me back up. Do you know who Mackenzie is?

A. From reading the documents, I know who they are; yes, I do.

Q. Do you know that they are a retailer who had spoken to Adams about a potential gray market Costco problem in Canada?

MR. GLUCKOW: Objection to the form. Mischaracterizes the record.

You can answer.

THE WITNESS: I know they were the Canadian, I'll say, distributor or retailer of Adams.

BY MR. LEWIS:

Q. And what, if any, communications

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Q. Do you believe that there should have been contact between the underwriters and Mackenzie as part of due diligence?

A. No.

Q. And why is that?

A. I'll say that I don't know whether they were given, you know -- the list of customers that they were given simply didn't include them.

I guess I would also add that it's okay -- I wouldn't necessarily think -- and, again, it's very hard to put yourself back in their place, but I wouldn't necessarily think if I was trying to uncover or discover or investigate, that Canada would be a place that I would, you know, spend a lot of time looking for issues relative to southern California or Florida or someplace where I would intuitively have thought may have been more important to a golf club company.

Q. You have seen the questionnaire that Adams sent to -- strike that; that the underwriters sent to Adams' retailers as part of

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can you recall between Mackenzie and Adams on the subject of gray market or Costco?

MR. GLUCKOW: Between Mackenzie and Adams?

MR. LEWIS: Right, between Mackenzie and Adams.

THE WITNESS: I saw a series of documentation -- faxes, memos, whatever you want to call them -- going back and forth suggesting that they were having questioning of how these clubs -- were they in Costco and how they got there and what the company is going to do about it.

BY MR. LEWIS:

Q. Are you aware of any contact between the underwriters and Mackenzie as part of the due diligence process?

A. None.

Q. Did you have any understanding as to why there was no contact between the underwriters and Mackenzie in the due diligence process?

A. I don't. I don't.

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the due diligence process?

MR. GLUCKOW: Objection to the form. It assumes facts not in evidence.

You can answer.

BY MR. LEWIS:

Q. Have you seen questionnaires --

A. Yes.

Q. -- that were used in connection with the underwriters' investigation of retailers?

A. I have.

Q. And would it be fair to say that those questionnaires did not include any specific questions relating to gray marketing or Costco?

MR. GLUCKOW: Objection to the form. Vague and ambiguous.

You can answer.

THE WITNESS: The answer is yes, but I would think that the statement, "Are there any other issues (legal, contractual, or otherwise) which you feel are important" would certainly

28 (Pages 106 to 109)

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1 EDWARD NECARSULMER, III
2 take care of that responsibility.

3 MR. LEWIS: I move to strike the
4 latter part of that. We'll get to the
5 overall -- the larger question within
6 the questionnaires.

7 BY MR. LEWIS:

8 Q. Have you seen Exhibit 193?

9 A. Yes, I've seen it.

10 Q. Is it your understanding that
11 this is a blank copy of a Customer Due Diligence
12 Questionnaire that was used by the underwriters
13 in connection with the due diligence
14 investigation?

15 A. That's my understanding.

16 Q. Now, you mentioned, in response
17 to an earlier question, that the underwriters
18 had received information about gray marketing
19 from marketing people at Adams.

20 Can you tell me when in your
21 understanding that information was received?

22 MR. GLUCKOW: Objection to the
23 form. It mischaracterizes the
24 testimony.

25 You can answer.

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1 EDWARD NECARSULMER, III
2 THE WITNESS: I can't tell you
3 when. I know there was a press release
4 in June, I believe it was June.

5 BY MR. LEWIS:

6 Q. June --

7 A. I assume it was coincident or
8 before that time. I just can't tell you from
9 not having the documents; my memory isn't that
10 good.

11 Q. Well, do you recall any
12 testimony by Ms. Pulido-Crowe that the subject
13 of gray marketing came up during drafting
14 sessions?

15 A. I do recall that testimony. I
16 actually recall, to be exact, she said she
17 believed that it came up.

18 Q. In the drafting sessions?

19 A. Yes.

20 Q. And the drafting sessions were
21 all held in April?

22 A. Correct.

23 Q. Do you know -- strike that.

24 Can you recall, as you sit
25 here, any inquiries made by the underwriters

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1 EDWARD NECARSULMER, III
2 to Adams concerning Costco or gray marketing
3 after Adams issued the press release that it
4 had filed a proceeding against Costco?

5 MR. GLUCKOW: Can I have that one
6 back, please. Thank you.

7 (The court reporter read the
8 record as follows:

9 "QUESTION: Can you recall, as
10 you sit here, any inquiries made by the
11 underwriters to Adams concerning Costco
12 or gray marketing after Adams issued
13 the press release that it had filed a
14 proceeding against Costco?")

15 MR. GLUCKOW: Vague and
16 ambiguous.

17 You can answer.

18 THE WITNESS: I don't recall.

19 BY MR. LEWIS:

20 Q. Have you, in your long career in
21 the securities industry, been the person who had
22 to ask a customer information that was set forth
23 on a questionnaire?

24 A. I've done it but not in recent
25 memory or recent history.

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1 EDWARD NECARSULMER, III

2 Q. When you were --

3 A. Younger.

4 Q. -- younger and I was younger and
5 we all were browner on top.

6 Can you describe how difficult or
7 easy you found it to get a customer to answer
8 the questions on a due diligence questionnaire?

9 MR. GLUCKOW: Vague and
10 ambiguous.

11 You can answer.

12 THE WITNESS: My best
13 recollection is it's sort of both ends
14 of the spectrum. There are people who
15 like to talk; they are very
16 enthusiastic about XYZ's product; it's
17 important to them. There are other
18 people who basically tell you that they
19 don't talk much about, you know, their
20 suppliers. So it's -- people are
21 usually pretty cooperative, they are
22 usually -- but the value of the
23 information varies greatly.

24 BY MR. LEWIS:

25 Q. And you never know when exactly

29 (Pages 110 to 113)

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1 EDWARD NECARSULMER, III
2 you are getting someone and what kind of mood
3 he's in or she is in at the time you catch them,
4 is that fair?

5 MR. GLUCKOW: Vague and
6 ambiguous.

7 You can answer.

8 THE WITNESS: It's fair, with the
9 exception that you hope that, you know,
10 that you are good enough and you
11 understand enough about the subject to
12 qualify the responses.

13 BY MR. LEWIS:

14 Q. Was it your practice to actually
15 send customers questionnaires before you spoke
16 to them about the contents of them?

17 A. No.

18 Q. You used the questionnaire as a
19 guide to your conversation with the client and
20 pulled the information out of them as best you
21 could?

22 MR. GLUCKOW: Objection to the
23 form.

24 You can answer.

25 THE WITNESS: That's correct.

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1 EDWARD NECARSULMER, III
2 BY MR. LEWIS:

3 Q. Do you know how the
4 questionnaires were completed in this case?

5 A. They were -- it's my
6 understanding that they were -- there were
7 telephone or other conversations and they were
8 recorded by the questioner, the results were
9 recorded by the questioner.

10 Q. So that the questionee did not
11 necessarily -- did not have the questionnaire in
12 front of him?

13 A. I do not know that for a fact,
14 but that's my understanding.

15 Q. Now, I showed you the blank
16 questionnaire and that questionnaire contains
17 the question that you alluded to in the portion
18 of your testimony that I asked to strike, which
19 is Question 13: "Are there any other issues
20 (legal, contractual or otherwise) which you feel
21 are important?"

22 That is Question 13, correct?

23 A. Correct.

24 Q. If you wanted to determine in a
25 due diligence investigation whether there was

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1 EDWARD NECARSULMER, III
2 ongoing gray marketing distribution or ongoing
3 Costco distribution, would you agree that
4 Question 13 would not be a very direct way to
5 find that out?

6 MR. GLUCKOW: Objection to the
7 form. Incomplete hypothetical.
8 Assumes facts not in evidence. Vague
9 and ambiguous.

10 You can answer.

11 THE WITNESS: I would not agree
12 to that. Often these -- whether they
13 are a list of questions or they are a
14 questionnaire, you sent them out there
15 to set a framework to find out what you
16 can find out, and often it's more
17 useful to ask a question like this one
18 than -- sometimes it is -- than a more
19 direct "Are you doing this?" or "Are
20 you seeing that?" Because you might
21 get a more helpful response.

22 BY MR. LEWIS:

23 Q. Well, if the recipient of this
24 questionnaire had heard from Adams previously
25 that Adams was aware of some Costco distribution

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1 EDWARD NECARSULMER, III
2 and was taking steps to address it, the person
3 answering the questions might not think that
4 mentioning gray marketing was of any
5 importance. Is that fair?

6 MR. GLUCKOW: The same
7 objections.

8 You can answer.

9 THE WITNESS: I'm not trying to
10 be difficult; I just don't know how to
11 answer and the hypothetical is too far
12 out there for me.

13 It's certainly -- if someone
14 specifically told you, "Don't worry
15 about it; we are taking care of it,"
16 I'm not sure that would deter you from
17 saying there's an issue but the company
18 is taking care of it. I just don't
19 know.

20 BY MR. LEWIS:

21 Q. In any event, there was no
22 specific question about Costco or gray marketing
23 on that questionnaire --

24 MR. GLUCKOW: Objection.

25 BY MR. LEWIS:

30 (Pages 114 to 117)

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1 EDWARD NECARSULMER, III
 2 Q. -- the document that we just
 3 looked at, 193?
 4 MR. GLUCKOW: The document speaks
 5 for itself.
 6 You can answer.
 7 THE WITNESS: I agree.
 8 BY MR. LEWIS:
 9 Q. Do you believe that between the
 10 time of the filing of the draft registration
 11 statement with the SEC, which was on May the 4th
 12 of 1998, and the effective date of the IPO,
 13 which was July 10, 1998, the underwriters
 14 received any information from Adams that gray
 15 marketing was occurring at any location other
 16 than in Canada?
 17 MR. GLUCKOW: Can I get that read
 18 back, please.
 19 (The court reporter read the
 20 pending question.)
 21 MR. GLUCKOW: Objection to the
 22 form. It assumes facts not in
 23 evidence.
 24 You can answer.
 25 THE WITNESS: I don't recall the

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1 EDWARD NECARSULMER, III
 2 dates. I know there was discussion,
 3 but I can't tell you whether they were
 4 between -- what periods they were or
 5 what the dates were.
 6 BY MR. LEWIS:
 7 Q. Well, are you aware of any
 8 communication from Adams to the underwriters
 9 that gray marketing was occurring other than at
 10 a single location?
 11 MR. GLUCKOW: The same
 12 objections.
 13 THE WITNESS: I'm not aware of
 14 any communication.
 15 BY MR. LEWIS:
 16 Q. Do you believe, as you sit here,
 17 that it was true at the effective date that a
 18 small set of Tight Lies clubs had reached Costco
 19 at only one location?
 20 MR. GLUCKOW: Objection to the
 21 form. Mischaracterizes the record --
 22 THE WITNESS: I really don't
 23 know.
 24 MR. GLUCKOW: Let me just finish.
 25 -- vague and ambiguous.

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1 EDWARD NECARSULMER, III
 2 You can answer.
 3 BY MR. LEWIS:
 4 Q. Do you believe, as you sit here,
 5 that it was true that at the time of the
 6 effective date a group of Adams' clubs had
 7 reached the market through Costco as a result of
 8 the efforts of a single Adams' retailer?
 9 MR. GLUCKOW: Objection. Vague
 10 and ambiguous. Incomplete
 11 hypothetical. Mischaracterizes the
 12 record.
 13 You can answer.
 14 THE WITNESS: In the materials
 15 that I reviewed, there were references
 16 to a number of potential sources, and I
 17 don't know if it was ever determined as
 18 to it was one or more than one.
 19 BY MR. LEWIS:
 20 Q. Well, isn't it true that by the
 21 time of the offering that there had been citings
 22 of Adams' clubs at Costco locations in Canada,
 23 in California, in Idaho?
 24 MR. GLUCKOW: Objection to the
 25 form. It mischaracterizes the record.

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1 EDWARD NECARSULMER, III
 2 You can answer.
 3 THE WITNESS: I think that's
 4 true.
 5 BY MR. LEWIS:
 6 Q. How did you learn that?
 7 A. It was in the documentation that
 8 I read.
 9 Q. Did you see that in any other
 10 place than in the attachments to Mr. Grace's
 11 report?
 12 A. Yes.
 13 Q. Where did you see it?
 14 A. I'm not sure I can recall the
 15 document. I'm not -- it may have been in a
 16 deposition, either -- I'm not sure. I don't
 17 want to speculate. I think Beebe's deposition,
 18 but I'm not sure. I'm just not certain.
 19 Q. Would you agree that by the time
 20 of the initial public offering Adams had been
 21 unable to put a complete stop to gray marketing?
 22 MR. GLUCKOW: Vague and
 23 ambiguous.
 24 You can answer.
 25 THE WITNESS: I would agree with

31 (Pages 118 to 121)

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that.

BY MR. LEWIS:

Q. Have you seen any evidence that the underwriters were aware of new or increased distribution of Adams' products in Costco locations between the time of Ms. Pulido-Crowe's discussion with Barney Adams and the time of the IPO?

MR. GLUCKOW: Objection. Vague and ambiguous. Incomplete.

THE WITNESS: Not during that period, no.

BY MR. LEWIS:

Q. And do you have any reason to believe, as you sit here, that the underwriters learned anything about the changes in gray market distribution between Ms. Pulido-Crowe's discussion with Barney Adams and the IPO?

MR. GLUCKOW: Objection to the form. It mischaracterizes the record particularly with respect to the reference to a discussion.

You can answer.

THE WITNESS: At some point, the

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process of these pro shop surveys began by the equity research analyst. I believe that did start before the IPO. I'm not certain that information would have been -- in my experience, it was unlikely that that information would have been shared with the banking team.

BY MR. LEWIS:

Q. Why do you say it's unlikely it would have been shared?

A. Because in most cases as they -- that the research that was done out of the equity department would not likely to be, you know, shared with; it was not normal practice to share it with the people in the investment banking side.

Q. Did that have to do with the existence of the so-called Chinese walls between the investment banking and the research side, the brokerage firms, in those days?

A. Partially; although, there would be nothing specifically prohibited of information going that way.

Q. "That way" meaning...?

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A. The direction from research to banking. So it wasn't a normal -- to me, it wouldn't have been a normal practice, normal procedure.

Q. There would have been a prohibition on information going the other direction, from banking to research?

A. That is correct.

MR. GLUCKOW: Don, again, we've been going another hour, so whenever there is a convenient break.

MR. LEWIS: We can stop this second.

MR. GLUCKOW: Okay.

(A recess was had from 2:31 p.m. to 2:43 p.m.; and then the proceedings continued as follows:)

BY MR. LEWIS:

Q. Let me back up to go forward. In your expert report in this case, the first page --

A. So this is also the rebuttal report.

MR. GLUCKOW: Here we are, 321.

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THE WITNESS: First page, yes.

BY MR. LEWIS:

Q. The first page, Paragraph 6(A), Summary of Opinions. You begin by saying: "In my experience in the process of adequate due diligence, the underwriters should gather and review the following types of information. The contents and scope of this review may vary greatly depending on the issuer, but in general, these are the categories that should be considered."

In your expert report in the AMF case --

MR. GLUCKOW: 324?

MR. LEWIS: 324.

BY MR. LEWIS:

Q. -- you used the same words except that instead of "should be considered," you had used the words "must be considered."

A. Semantics.

Q. Is there any significance to the change in your report?

A. Semantics.

Q. Did you think it was more

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1 EDWARD NECARSULMER, III
2 correct to say "should" than "must"?
3 A. I candidly can't answer that. I
4 think of -- I thought of the -- I tried to
5 conceive of the thought and I really didn't
6 refer to this much past -- the prior report,
7 much past kind of using it for form, and I knew
8 there was some boilerplate that would be
9 acceptable to be used in the beginning, and then
10 I kind of just went ahead and drafted as I saw
11 fit.

12 Q. In the same Paragraph 6, the
13 next page --

14 A. On AMF or Adams?

15 Q. In Adams.

16 Well, let's look at -- do you
17 have AMF there?

18 MR. GLUCKOW: We have both, 321
19 and 324.

20 BY MR. LEWIS:

21 Q. In AMF, among the steps you
22 listed was number 6: "Review of work performed
23 or reports prepared by underwriters' counsel and
24 the issuer's auditors."

25 Your Paragraph 6 in this case

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1 EDWARD NECARSULMER, III
2 simply read: "Meeting with the issuer's counsel
3 and public accountants."

4 Can you explain whether there was
5 a difference that caused you to change your
6 report?

7 MR. GLUCKOW: Object to the
8 characterization.

9 BY MR. LEWIS:

10 Q. Is there any significance to the
11 change in terminology between the two reports?

12 A. I thought in -- that the way I
13 said it in 321 was a better representation of
14 what the process really is.

15 Q. Can you explain that thought?

16 A. Because it occurred to me -- and
17 again, I didn't think it was a major thing -- it
18 sort of occurred to me that you weren't
19 necessarily just reviewing their work, you were
20 meeting with them, you were talking with them,
21 you were trying to understand, let's say, there
22 was a patent issue or an inventory issue, so it
23 wasn't just the report but you are trying to
24 have a dialog as part of your understanding of
25 the company; that was what I was really trying

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1 EDWARD NECARSULMER, III
2 to get at.

3 Q. Okay. Would you agree with the
4 general proposition that in due diligence an
5 underwriter should be skeptical of rosy outlooks
6 by the issuer's management?

7 MR. GLUCKOW: Object to the
8 form. Vague and ambiguous. Asked and
9 answered.

10 You can answer.

11 THE WITNESS: I don't think --
12 just because someone is optimistic
13 doesn't necessitate skepticism. We've
14 come to learn to live with rapid growth
15 in our -- once we got out of the '60s
16 and '70s, rapid growth was a big part
17 of our lives. So I would have to say
18 even though intuitively I would agree
19 with you, I think the right answer is
20 no.

21 BY MR. LEWIS:

22 Q. Now, in Paragraph 6(C)(2) of
23 your report, you state that "An extensive due
24 diligence outline and materials request list was
25 prepared and presented to company management at

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1 EDWARD NECARSULMER, III
2 the organizational meeting."

3 Just to make sure we are on the
4 same page: Are you referring there to Exhibit
5 153? Specifically, to the due diligence -- due
6 diligence outline and request list that begins
7 at Page 8741?

8 A. Yes, that is to what I was
9 referring.

10 Q. And would it be fair to say that
11 there was no specific request in the due
12 diligence outline or materials request for data
13 relating to either Costco or gray marketing?

14 MR. GLUCKOW: Objection to the
15 extent the document speaks for itself.

16 You can answer.

17 THE WITNESS: That's correct. If
18 I could add, in this type of a list it
19 doesn't surprise me at all that there
20 isn't specific caption items. It's
21 usually given to let the company know
22 what the work ahead of them is.

23 BY MR. LEWIS:

24 Q. Okay. Is there any item on the
25 due diligence list or materials request list

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1 EDWARD NECARSULMER, III
2 that you believe should have caused the company
3 to provide the underwriters with any data
4 regarding either Costco or gray market
5 distribution?

6 MR. GLUCKOW: Object to the
7 form. The document speaks for itself.
8 It calls for speculation.

9 You can answer.

10 THE WITNESS: No.

11 BY MR. LEWIS:

12 Q. Let me show you Exhibit 154,
13 previously marked, and this is a document with a
14 file folder tab Organization Meeting and some
15 handwritten notes that may be beyond my eyesight
16 or cryptography skills at this point.

17 A. I'm with you.

18 Q. Did you review a version of
19 Exhibit 154 in the course of your work?

20 A. I did see this document.

21 Q. Did you work your way through it
22 at the time?

23 A. To the best of my ability.

24 Q. Did you find any reference in it
25 that you thought was to gray marketing or Costco

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1 EDWARD NECARSULMER, III
2 distribution?

3 MR. GLUCKOW: Object to the
4 extent the document speaks for itself.

5 You can answer.

6 THE WITNESS: No.

7 BY MR. LEWIS:

8 Q. Let me show you what has been
9 marked as Exhibit 228. Did you review Exhibit
10 228 in the course of your work?

11 A. I've seen this article before,
12 so the answer is yes.

13 Q. If you just look at the last
14 page of the document, you'll see there's a
15 reference to Edwin Watts and some commentary
16 about various subjects. Did you read that
17 paragraph?

18 MR. GLUCKOW: Take your time and
19 make sure you read it before you
20 answer.

21 (Witness reviewing document.)

22 THE WITNESS: I don't recall
23 reading that paragraph.

24 BY MR. LEWIS:

25 Q. Okay. Do you have any reason to

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1 EDWARD NECARSULMER, III
2 believe that the underwriters had a copy of
3 Exhibit 228 prior to the effective date of the
4 offering in their due diligence files?

5 MR. GLUCKOW: Objection to the
6 form.

7 You can answer.

8 THE WITNESS: I wouldn't know.

9 BY MR. LEWIS:

10 Q. Let me show you Exhibit 197, and
11 this is a copy of what purports to be a Customer
12 Due Diligence Questionnaire completed with
13 respect to Edwin Watts. Have you reviewed this
14 as part of your expert work in this case?

15 A. Yes, it was in the material that
16 I was provided.

17 Q. If you had been conducted --
18 strike that.

19 Do you have any reason to believe
20 that Mr. Watts was asked any specific questions
21 about Costco in the course of his interview,
22 which was, according to this date, on April 21,
23 1998?

24 MR. GLUCKOW: The document speaks
25 for itself.

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1 EDWARD NECARSULMER, III
2 distribution?

3 MR. GLUCKOW: Object to the
4 extent the document speaks for itself.

5 You can answer.

6 THE WITNESS: No.

7 BY MR. LEWIS:

8 Q. Let me show you what has been
9 marked as Exhibit 228. Did you review Exhibit
10 228 in the course of your work?

11 A. I've seen this article before,
12 so the answer is yes.

13 Q. If you just look at the last
14 page of the document, you'll see there's a
15 reference to Edwin Watts and some commentary
16 about various subjects. Did you read that
17 paragraph?

18 MR. GLUCKOW: Take your time and
19 make sure you read it before you
20 answer.

21 (Witness reviewing document.)

22 THE WITNESS: I don't recall
23 reading that paragraph.

24 BY MR. LEWIS:

25 Q. Okay. Do you have any reason to

1 EDWARD NECARSULMER, III
2 You can answer.

3 THE WITNESS: I have no knowledge
4 of that question or response to it.

5 BY MR. LEWIS:

6 Q. And you have no knowledge of
7 there being questions asked that are not
8 contained or commented on in this document
9 itself?

10 A. I could respond that it would be
11 unusual that the conversation would just --
12 would you mind answering the following nine
13 questions; but I certainly couldn't support
14 that, I mean, cite any evidence of that.

15 Q. Why do you say it would be
16 unusual?

17 A. Well, the purpose of these type
18 of exercises is to engage the person you are
19 talking to in some sort of a dialog about the
20 company you are checking on. Sometimes they are
21 expansive; sometimes they are not. Usually the
22 questionnaire is, you know, an outline, a way to
23 memorialize the conversation, but, hopefully,
24 it's -- you know, there's some dialog, but I
25 don't know because I haven't seen it, and I have

34 (Pages 130 to 133)

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1 EDWARD NECARSULMER, III
2 no evidence to prove or no documentation to
3 prove that that's what took place.

4 Q. In your experience, is it
5 customary for notes to be taken during customer
6 questionnaires?

7 A. Customary, yes.

8 Q. Are you aware of any customary
9 practices in the industry with respect to the
10 disposition of drafts and notes that were made
11 prior to an IPO?

12 MR. GLUCKOW: Objection to the
13 form. I also object to the extent it's
14 overbroad.

15 Do you mean at any point in his
16 career? Are you talking about a
17 specific time frame?

18 BY MR. LEWIS:

19 Q. Let's talk about the period
20 since 1998, do you believe that it is customary
21 in the industry for underwriters to dispose of
22 notes that they made during the due diligence
23 process?

24 MR. GLUCKOW: The same
25 objections.

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1 EDWARD NECARSULMER, III
2 Go ahead.

3 THE WITNESS: I wouldn't say
4 specific to due diligence process.
5 There certainly was a movement among
6 all of our client -- compliance
7 departments to be much more cognizant
8 of what we kept and didn't keep and at
9 what point, you know, like how long you
10 have to keep your tax-return-type
11 standards. So I think people were more
12 careful to keep what they were supposed
13 to keep and more careful to keep -- not
14 to keep what didn't need to be kept.

15 BY MR. LEWIS:

16 Q. And when did that begin?

17 A. I couldn't give you a specific
18 date, but it was an evolving thing throughout --
19 certainly throughout the '90s, it would be a
20 more evolving practice.

21 Q. So that by 1998 your people were
22 more careful to do what you said --

23 A. Yes.

24 Q. -- in your last answer?

25 Since 1998 you worked both at

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1 EDWARD NECARSULMER, III
2 Wasserstein Perella Securities and Dresdner
3 Kleinwort Wasserstein. Did either of those
4 firms have a practice of disposing of notes of
5 due diligence after an IPO?

6 A. Not a specific policy, no.

7 Q. Let me start with a broad
8 question, and if I need to, I'll go to more
9 specific ones.

10 We've talked several times about
11 the Customer Due Diligence Questionnaires. Did
12 you find reference to either gray marketing or
13 Costco distribution appearing in any of the
14 customer due diligence questionnaires?

15 A. I don't believe I did.

16 Q. Would you like to see them now
17 to check your answer, or --

18 MR. GLUCKOW: The documents speak
19 for themselves.

20 THE WITNESS: I don't think I
21 need to check my answer.

22 BY MR. LEWIS:

23 Q. Okay.

24 A. I'm not necessarily ready for a
25 memory test, but I believe that's the case; I'm

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1 EDWARD NECARSULMER, III
2 confident that that's the case.

3 Q. Okay. In Paragraph 5 on Page 3
4 of your expert report, Exhibit 321 --

5 A. I'm sorry, Paragraph...?

6 Q. 5.

7 A. Which is on Page 3. Okay.

8 Q. "The underwriters prepared lists
9 of potential investor questions," dash, "in my
10 experience this was always an effective
11 mechanism for raising and responding to relevant
12 issues."

13 When you wrote that, were you
14 referring to Exhibit 210?

15 A. That's correct.

16 Q. Were there any other lists of
17 investor questions that you were referring to in
18 Paragraph 5 of your opinion?

19 A. This is what I was referring
20 to.

21 Q. Do you know when this was
22 prepared, "this" being Exhibit 210?

23 A. I don't know the specific date.
24 I know where in the process, which was prior to
25 the company going on the road to seek potential

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1 EDWARD NECARSULMER, III
2 investors.

3 Q. Sometime by June of 1998?

4 A. By June, I don't -- we can look
5 at the road show schedule and have an exact
6 date, but I don't recall it.

7 Q. Would you agree with me that
8 nothing in Exhibit 210 refers either to gray
9 marketing or to Costco?

10 MR. GLUCKOW: The document speaks
11 for itself.

12 You can answer.

13 THE WITNESS: That's correct.

14 BY MR. LEWIS:

15 Q. It is correct that there's no
16 reference?

17 A. It is correct that there's no
18 reference.

19 Q. Let me show you what has been
20 marked as Exhibit 204, a memo to the file from
21 Joe Hoffman, dated June 25, 1998. Do you recall
22 this document?

23 A. I do.

24 Q. Do you have any understanding of
25 how this document came to be in the

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1 EDWARD NECARSULMER, III
2 underwriters' files as reflected by the page
3 number in the bottom right-hand corner?

4 A. As a matter of practice, if
5 there is dialog usually between the assigned
6 examiner of the commission and usually issuer's
7 counsel, they'll provide the underwriters a copy
8 of any information that comes of that source.

9 Q. From your review of documents
10 and testimony, are you aware of any dialog
11 between Adams and the underwriters with respect
12 to this exhibit?

13 A. I'm not.

14 Q. Are you aware of any
15 communications between the underwriters and the
16 SEC related to this exhibit, based on your
17 review of the transcripts and exhibits?

18 A. I don't recall any.

19 Q. I would next like to show you
20 what has been marked as Exhibit 159, and this is
21 a two-page exhibit, the first page of which is
22 entitled Additional Due Diligence Material.

23 Do you have any understanding of
24 what this exhibit is?

25 A. I believe right before -- really

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1 EDWARD NECARSULMER, III
2 prior to pricing, street practice is to have a
3 so-called bringdown due diligence call where you
4 just make sure there are no -- you try to ensure
5 there are no issues -- I don't know if the word
6 is material, but no significant change between
7 what you know and as you go to become effective
8 the next morning. And this looks to me --
9 appears to be the notes from that type of
10 meeting.

11 Q. Now, at the companies that
12 you've worked at, is bringdown due diligence
13 recorded more formally than by a set of notes?

14 MR. GLUCKOW: Objection to the
15 form.

16 You can answer.

17 THE WITNESS: No. I mean, I
18 guess I would have assumed maybe the
19 notes were typed up, but basically this
20 is the form I'd be used to.

21 It is often pro forma, if that's
22 the -- you know. Unless there's some
23 significant issue that comes up. In
24 many cases, you know, people are on the
25 road at different places; often the

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1 EDWARD NECARSULMER, III
2 management -- you know, the CFO is in
3 San Francisco, the CEO is in London
4 making presentations and sometimes they
5 are not even on the call, and it's
6 usually just an update of where you are
7 in terms of the effectiveness, has it
8 gotten NASD approval, that kind of
9 stuff. So this doesn't surprise me,
10 no.

11 BY MR. LEWIS:

12 Q. Do you have any understanding as
13 to whose notes these are?

14 A. I could guess, but I don't know.

15 Q. As a general proposition, as you
16 were doing your work looking at documents and
17 transcripts, if you had a question about the
18 documents, did you from time to time consult
19 with Simpson Thacher about the significance of a
20 document or the author of a document?

21 A. I don't believe we ever had -- I
22 mean, we were certainly in touch talking about
23 my progress and where -- you know, but I don't
24 -- it didn't really arise. I mean, the answer
25 is no, it really did not -- it didn't come up.

36 (Pages 138 to 141)

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EDWARD NECARSULMER, III

Q. Okay. Is it your understanding that these are notes of a telephone conversation rather than that of a meeting?

A. That would be my surmise, but it's only that.

Q. And what is that based on?

A. Based on the way it's almost always a so-called bringdown call because the people are not usually in the same place.

Q. Is there, in your experience, a standard format for a bringdown call?

A. No. In my experience, it's quite informal; it's tick off three or four points, anything we ought to be aware of. It can be combined with an update of where you are in terms of effectiveness, other forms need to be filed. So generally it kind of takes this form.

Q. Did you see anything in this document when you reviewed it that you believe referred either to Costco or to gray marketing more broadly?

MR. GLUCKOW: The document speaks for itself.

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EDWARD NECARSULMER, III

But you can answer.

THE WITNESS: No.

BY MR. LEWIS:

Q. I previously showed you Exhibit 160 which was the July 14, 1998, summary of due diligence conducted by the Lehman Brothers Adams Golf team.

Did you see anything in Exhibit 198 which referred to either gray marketing or Costco distribution?

MR. GLUCKOW: You said 198.

BY MR. LEWIS:

Q. I'm sorry; that was the one that has been variously numbered as 160 and 198.

So the question is, since you have 160 in front of you, whether you saw anything in the summary of due diligence contained in Exhibit 160 that you believe referred to either Costco or gray marketing issues?

MR. GLUCKOW: The document speaks for itself.

But you can answer it.

THE WITNESS: I'm assuming Page 3

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EDWARD NECARSULMER, III

that there's nothing that I'm not seeing. Correct?

BY MR. LEWIS:

Q. I think your assumption is absolutely correct.

A. With that assumption, the answer is there's nothing referring to either of those subjects.

(Whereupon, documents were marked, for identification purposes, as Exhibit 325 and Exhibit 326.)

BY MR. LEWIS:

Q. I'm going to hand you two exhibits together, 325 and 326.

MR. LEWIS: Off the record.

(A discussion was held off the record.)

BY MR. LEWIS:

Q. 325 is a copy of documents that you referred to in your rebuttal report and some of those pages -- there were a few pages not included because some of the Adams advertising materials were double-sided and someone, not doing their due diligence in the copying

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EDWARD NECARSULMER, III

process, left those pages out when the document was compiled, so those missing pages are contained in Exhibit 326.

You'll see that the documents that are compiled in this exhibit include due diligence questionnaires, sales data, advertising data, and, to the best of my knowledge, these are all the pages that you referred to in your rebuttal report.

MR. GLUCKOW: Just to be clear, we haven't obviously checked to make sure this is the case, but what you are saying is when you combine 325 and 326, all of the documents cited in the rebuttal report should be included in 325 and 326.

MR. LEWIS: They should be. And the ones in 326 are all advertising-type documents which go sort of into the span of documents in the middle that have Adams Tight Lies advertisements and humorous items about Barney and a press release here and there.

37 (Pages 142 to 145)

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1 EDWARD NECARSULMER, III

2 BY MR. LEWIS:

3 Q. At the risk of beating the horse
4 dead, again, to your knowledge, is there
5 anyplace in any of the pages referred to in your
6 rebuttal report which touched on gray marketing
7 or Costco distribution?

8 MR. GLUCKOW: And again, you are
9 focused on the UND production which we
10 have in front of us and 325 and 326,
11 not on deposition testimony?

12 MR. LEWIS: That is correct.

13 THE WITNESS: Then I would say --
14 I was thinking aloud; excuse me. Let
15 me just make sure.

16 To the best of my knowledge, that
17 is correct.

18 BY MR. LEWIS:

19 Q. Moving forward chronologically,
20 I will show you Exhibit 215 which is a Lehman
21 Brothers memorandum, facsimile, suggested
22 outline, and list of concerns. The transmittal
23 date on the fax is July 29, 1998.

24 Did you review this document?

25 A. I did see this document.

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1 EDWARD NECARSULMER, III

2 Q. And did you see, on the third
3 page of the exhibit, the item "Discounting -
4 Tight Lies have been seen in many Costcos for
5 \$146? How is product getting there? What is
6 Adams Golf doing about it?"

7 A. I have seen that.

8 Q. Have you seen any documents that
9 explain to you how that information came into
10 the possession of the underwriters?

11 A. I had not seen a document
12 documentary of it, no.

13 Q. Do you recall any testimonial
14 evidence?

15 A. It is my recollection that
16 either Picchi or Lantier, who were the two
17 Lehman equity research analysts, did refer to
18 this in their deposition testimony. I can't
19 tell you which one. I would say Lantier, if I
20 had to make a determination.

21 L-A-N-T-I-E-R. P-I-C-C-I, I
22 think. It may be P-I-C-C-H-I.

23 Q. So that other than the
24 deposition transcripts of the equity analysts,
25 you are unaware of any means by which one could

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1 EDWARD NECARSULMER, III

2 determine how the information came into Lehman's
3 possession that caused someone to write the
4 words that appear on the page I read to you?

5 MR. GLUCKOW: Objection to the
6 form. It mischaracterizes the
7 testimony.

8 But you can answer.

9 THE WITNESS: I would add that,
10 you know, since this is post IPO, it's
11 highly plausible that's -- that this
12 came through an investor or type of
13 question to the research analyst.

14 BY MR. LEWIS:

15 Q. Can you explain why you say
16 that?

17 A. Well, what happens often is that
18 as you are talking about the story or the stock,
19 particularly if the stock is, you know, either
20 going up or down a lot and therefore is the
21 subject, research analysts are constantly
22 talking to their customers who are the --
23 they're counterpart analysts or portfolio
24 managers at usually large financial
25 institutions, or it could be an officer manager

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1 EDWARD NECARSULMER, III

2 someplace, and a lot of the process is feedback,
3 and somebody said, you know, what do you think
4 is going on? I heard, you know, from my golf
5 pro or a guy at Fidelity asked me about... I
6 mean, in my experience a lot of the information
7 is actually incoming, so it could very well have
8 come through that way as well.

9 Q. Let me show you what I've marked
10 previously as 217. This is a teleconference
11 script dated August 5, 1998, sent to Olga
12 Pulido-Crowe and Pat Walravens,
13 W-A-L-R-A-V-E-N-S, from the desk of Patty
14 Walsh. And at Page 40671, you will see a
15 reference, under the heading of Discounting, to
16 "Tight Lies have been seen in many Costcos for
17 \$146. How is the product getting there?" and an
18 answer is given.

19 Does anything in this document --
20 strike that.

21 Do you have any reason to
22 believe that the information that's contained
23 on Page 40670, which is similar to the
24 information we saw in the "concerns" box on
25 Exhibit 215, came as a surprise to the

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1 EDWARD NECARSULMER, III
2 underwriters?

3 MR. GLUCKOW: Objection to the
4 form. Just to clean up the record, I
5 think you said 40670. I'm assuming you
6 must have meant 40671.

7 MR. LEWIS: I tried to say
8 40671. I probably sputtered it.

9 MR. GLUCKOW: And then you are
10 comparing the language at the bottom of
11 40671 with the language in 215?

12 MR. LEWIS: Correct.

13 MR. GLUCKOW: And what's the
14 question?

15 BY MR. LEWIS:

16 Q. Looking at those two documents
17 together, do you recall -- strike that.

18 Seeing those two documents
19 together, do you have any recollection of any
20 explanation that you learned during your
21 investigation in this case of how the
22 underwriters came to learn of gray marketing
23 distribution through Costco after the IPO?

24 MR. GLUCKOW: Vague and
25 ambiguous.

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1 EDWARD NECARSULMER, III

2 But you can answer.

3 Asked and answered as well.

4 Go ahead.

5 THE WITNESS: Again, I can only
6 surmise that it came through investor
7 feedback or through the surveys that
8 the equity research analyst did.

9 BY MR. LEWIS:

10 Q. You referred earlier to the
11 surveys. I'll place before you a copy of
12 Exhibit 180, previously marked, and specifically
13 I'll direct your attention to Page 27.

14 Is the survey that appears on
15 that page the survey you are referring to in
16 your testimony?

17 A. Yes.

18 Q. And do you have any reason to
19 believe that Lehman learned of Costco
20 distribution or gray market distribution through
21 the pro shop survey before the IPO date?

22 MR. GLUCKOW: Objection to the
23 form. Vague and ambiguous. Asked and
24 answered.

25 You can answer.

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1 EDWARD NECARSULMER, III

2 THE WITNESS: Absolutely not.

3 There's no reference that that happened
4 in any of the material that I reviewed.

5 BY MR. LEWIS:

6 Q. Do you recall Mr. Lantier being
7 unable to date precisely when his pro shop
8 survey calls were made?

9 MR. GLUCKOW: Objection. The
10 deposition record speaks for itself.

11 You can answer.

12 THE WITNESS: I do recall that in
13 the deposition.

14 BY MR. LEWIS:

15 Q. Would it be fair to say that to
16 the best of your recollection Mr. Lantier
17 couldn't speak to that subject one way or the
18 other?

19 MR. GLUCKOW: The same objection.

20 You can answer.

21 THE WITNESS: I don't have an
22 appropriate response. I don't know.

23 MR. LEWIS: Off the record.

24 (A discussion was held off the
25 record.)

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1 EDWARD NECARSULMER, III

2 (Whereupon, a document was

3 marked, for identification purposes, as
4 Exhibit 327.)

5 BY MR. LEWIS:

6 Q. I've marked as Exhibit 327 a
7 document with the heading Exhibit VII. Do you
8 recognize this document?

9 A. I've seen the document.

10 Q. And where have you seen it?

11 A. It was within the underwriter
12 production, I believe. It was within the
13 documents that I referred to in Schedule B.

14 Q. Of your --

15 A. Of 321.

16 Q. Well, to be fair to you, sir,
17 this was an exhibit to the expert report of
18 Mr. Grace.

19 A. Okay. I accept that as a fact.
20 As I said in my rebuttal report, I did review
21 that report as well, I just don't remember.

22 Q. Did you review this -- did you
23 review the entirety of Mr. Grace's report in
24 preparation of your rebuttal report?

25 A. "Preparation" is not the right

39 (Pages 150 to 153)

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1 EDWARD NECARSULMER, III
2 word. I read it as something related to the
3 case, related to what I -- you know, to what my
4 role was as well.

5 MR. GLUCKOW: But in terms of the
6 entirety, just to be clear, as the
7 attachment to the rebuttal report
8 indicates, we sent Mr. Necarsulmer
9 copies of all the expert reports
10 including the exhibits so this
11 (indicating) would have been included
12 in what we sent Mr. Necarsulmer.

13 MR. LEWIS: Right; but he
14 wouldn't have seen it before it was
15 issued.

16 MR. GLUCKOW: Correct.

17 MR. LEWIS: And this was in the
18 -- oh.

19 MR. GLUCKOW: I'm saying in the
20 rebuttal report.

21 THE WITNESS: Right. That's why
22 I said in Exhibit B to my rebuttal
23 report. Or Exhibit A, I guess it is,
24 in my rebuttal report.

25 BY MR. LEWIS:

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1 EDWARD NECARSULMER, III
2 were listed by Mr. Grace in this report?

3 MR. GLUCKOW: You mean had he
4 seen reference to them in the materials
5 in Exhibit A -- or Exhibit B, rather,
6 to his report which included all the
7 depositions and the exhibits to the
8 depositions, or has he seen them in
9 this format (indicating)? I'm not sure
10 what the question is.

11 BY MR. LEWIS:

12 Q. Let me try a simple question.

13 MR. LEWIS: Off the record.

14 (A discussion was held off the
15 record.)

16 BY MR. LEWIS:

17 Q. Let me take you to Page 2 of
18 this -- of this report. You'll see that under
19 the date of May 6, 1998, according to this
20 table, Pro Golf Discount in Fairfax, Virginia,
21 canceled an order because Adams' clubs are in
22 Costco.

23 Do you recall seeing a reference
24 to that in any of the depositions or exhibits
25 that you had read in your work?

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1 EDWARD NECARSULMER, III
2 Q. Did you read through this?
3 A. I did look through this.
4 Q. Did you specifically look at the
5 first six pages of this?

6 MR. GLUCKOW: Objection to the
7 form. He said he's read the entire
8 document, but -- you can answer.

9 BY MR. LEWIS:

10 Q. Well, when you read the entire
11 document, did you have any reason in your own
12 mind to focus on the first six pages of this?

13 A. I had no particular reason to do
14 that, no.

15 Q. Did you read through the
16 complaints to Adams Golf regarding Costco that
17 are listed in the chronological order that
18 Mr. Grace listed them in this report?

19 A. I did.

20 Q. And the solutions purportedly
21 implemented by Adams Golf as also listed on
22 this?

23 A. Correct.

24 Q. Had you previously seen the
25 complaints, the Adams numbered complaints, that

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1 EDWARD NECARSULMER, III
2 A. I don't.

3 Q. On May 7, 1998, according to
4 Mr. Grace, Adams Golf clubs were found in Costco
5 in Modesto, California.

6 Do you recall having seen a
7 reference to that in your work?

8 A. I can't recall.

9 Q. May 21, according to Mr. Grace,
10 Pro Golf complains that Costco is selling Adams
11 Golf product.

12 Do you recall having learned of
13 that in your investigation?

14 A. I don't recall that either.

15 Q. On May 29, 1998, according to
16 the table, "WDC Mackenzie reports that a new
17 shipment of Adams Golf clubs have hit Canadian
18 Costcos."

19 Do you remember seeing
20 reference to that in the --

21 A. I do remember seeing that in the
22 correspondence between the two.

23 Q. June 1, 1998, according to
24 Mr. Grace, "Centerville Golf in Centerville,
25 Virginia, complained about Adams clubs in

40 (Pages 154 to 157)

Page 158

1 EDWARD NECARSULMER, III
2 Costco."

3 Do you recall having learned that
4 in your work in the case prior to seeing
5 Dr. Grace's -- Mr. Grace's report?

6 A. I don't recall that
7 specifically, no.

8 Q. All right. How about the item
9 for June 8, 1998; Merrifield Golf in Fairfax,
10 Virginia, called regarding Adams clubs seen at
11 Costco."

12 Do you recall learning that?

13 A. I don't recall learning that.

14 Q. June 11, 1998, Jack Tone,
15 T-O-N-E, Golf in Ripon, R-I-P-O-N, California,
16 called regarding Adams' clubs in Costco.

17 Do you remember seeing that?

18 A. I don't.

19 Q. June 24, Green River Golf Club
20 in Corona, California, called to complain about
21 clubs in Costco. Do you recall learning that?

22 A. I don't recall learning that
23 either.

24 Q. June 25, two items, "Pro Golf
25 Discount in Boise, Idaho, called regarding their

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1 EDWARD NECARSULMER, III
2 problem selling clubs due to Costco," and
3 "Centerville Golf Center in Centerville,
4 Virginia, called to complain again about
5 Costco."

6 A. I do recall -- I do recall the
7 one in Idaho. I don't recall the other one in
8 California.

9 Q. Just a couple more.

10 A. Fine.

11 Q. June 29, Tierneys,
12 T-I-E-R-N-E-Y-S, Golf in Walnut Creek,
13 California, called regarding a customer
14 returning clubs after seeing Adams Golf clubs in
15 Costco.

16 A. I do recall seeing that.

17 Q. July 3, '98, "Customer requests
18 Adams Golf hat offer after buying clubs at a
19 Costco in Livonia, Michigan."

20 A. I don't recall that.

21 Q. Would you agree that the
22 portions of the summary that we've just gone
23 over contain information that was different with
24 respect to gray marketing and Costco than the
25 information that Mr. Adams had originally

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1 EDWARD NECARSULMER, III
2 supplied to Ms. Pulido-Crowe?

3 MR. GLUCKOW: Objection to the
4 form. It mischaracterizes the record.
5 It mischaracterizes the testimony.

6 You can answer.

7 THE WITNESS: If I recall from
8 Pulido-Crowe's deposition, the -- his
9 characterization of the problem was
10 that there was some problem with
11 Costco, they didn't believe it was
12 significant, and they were handling
13 it. I mean, that was my summary of
14 what I believe was said. And I don't
15 know that this is enough to tell me
16 that that's different, but it is a
17 little vague, my memory of same.

18 BY MR. LEWIS:

19 Q. I'll show you this in a second.
20 At Page 47 of her deposition Ms. Pulido-Crowe
21 was asked the question: "How did you determine
22 whether the gray marketing was material or not?"

23 "Answer: We of course first
24 spoke to the company, talked about the
25 distribution channels. The issue of -- the

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1 EDWARD NECARSULMER, III
2 discussion of Costco came up because of discount
3 warehouses. And we asked, was it much of a
4 problem? They said no, there was -- it was an
5 isolated incident -- I recall something to that
6 effect. My interpretation was it was an
7 isolated incident and that that person or
8 distributor, whoever it was that got those clubs
9 there, they were going to pursue that and put an
10 end to that."

11 MR. GLUCKOW: Are you
12 representing to the witness that that
13 is the only time that Ms. Pulido-Crowe
14 testified about her discussions with
15 the company concerning Costco and/or
16 gray marketing?

17 I certainly hope not.

18 MR. LEWIS: I'm not saying it's
19 the only time, but I'm not saying --

20 MR. GLUCKOW: The inference of
21 your question is that that is the
22 record as to the conversations.

23 MR. LEWIS: I haven't asked a
24 question, so I can't have an inference
25 to my question.

41 (Pages 158 to 161)

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1 EDWARD NECARSULMER, III

2 BY MR. LEWIS:

3 Q. My question is --

4 MR. GLUCKOW: I suggest
5 otherwise, but proceed.

6 MR. LEWIS: You suggest I have a
7 question out there?

8 MR. GLUCKOW: No. I suggest that
9 the way you just read that into the
10 record following the exchange that we
11 have had is misleading. But proceed.

12 BY MR. LEWIS:

13 Q. The first question is, was that
14 the testimony of Ms. Pulido-Crowe that you were
15 referring to?

16 A. Partially.

17 Q. Okay. Is there something else
18 that you recall?

19 You have the volume in front of
20 you and an index to it, if there's something
21 else you would like to refer my attention to.

22 Do you recall her ever telling --
23 strike that.

24 Do you recall her ever saying
25 that Barney Adams told her that Costco

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1 EDWARD NECARSULMER, III

2 know, one event. If they were coming
3 from multiple sources, I think it
4 wouldn't be.

5 BY MR. LEWIS:

6 Q. All right. Do you have any
7 reason to believe based on your investigation in
8 this case as part of your expert work -- let me
9 reframe that.

10 Do you have any reason to believe
11 based on your work in this case that the
12 underwriters reviewed the complaints that were
13 listed between the dates of May 6th and I guess
14 I stopped reading at July 3?

15 MR. GLUCKOW: Objection to the
16 form.

17 You can answer.

18 THE WITNESS: I know that they
19 certainly -- I shouldn't say
20 certainly. I believe they knew about
21 the Canadian one. And I don't know to
22 the extent they knew about the others.

23 BY MR. LEWIS:

24 Q. Forgive me if I'm asking you
25 something I've already asked you. Did I read

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1 EDWARD NECARSULMER, III
2 distribution was other than an isolated
3 incident?

4 MR. GLUCKOW: Objection to the
5 form.

6 THE WITNESS: I don't recall him
7 saying -- her saying anything besides
8 that, no.

9 BY MR. LEWIS:

10 Q. Okay. Would you agree that the
11 chart to Mr. Grace's report reflects that by the
12 time of the IPO, Costco distribution, whatever
13 it was, was not an isolated incident?

14 MR. GLUCKOW: It mischaracterizes
15 the record. It mischaracterizes the
16 testimony.

17 You can answer.

18 THE WITNESS: I mean, I just
19 don't know --

20 MR. GLUCKOW: Asked and answered
21 as well.

22 THE WITNESS: -- I just don't
23 know. If these were all coming from
24 the same source, then I suspect you
25 could characterize it as one -- you

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1 EDWARD NECARSULMER, III

2 you the entry for July 8, 1998: "Golfdom in
3 McLean, Virginia, called regarding a credit for
4 clubs they had purchased at Costco"?

5 MR. GLUCKOW: The question is did
6 you already ask him about that one?

7 MR. LEWIS: Right.

8 MR. GLUCKOW: The record will
9 speak for itself, but...

10 THE WITNESS: I don't know; I
11 just don't.

12 BY MR. LEWIS:

13 Q. Whether or not I read it to you
14 before, the entry here in Mr. Grace's report for
15 July 8, 1998, states that Golfdom in McLean,
16 Virginia, called regarding a credit for clubs
17 they had purchased at Costco.

18 Do you remember learning of that
19 prior to -- as a result of your work in this
20 case prior to the receipt of Dr. Grace's or
21 Mr. Grace's report?

22 MR. GLUCKOW: He's on Page 6.

23 THE WITNESS: I'll get to Page
24 6. I'm sorry, I went back to the
25 beginning.

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1 EDWARD NECARSULMER, III
 2 MR. LEWIS: Take your time.
 3 MR. GLUCKOW: This one
 4 (indicating).
 5 A. I don't -- I don't recall this
 6 specific one.
 7 Q. Okay. Based on your work in
 8 this case, do you know of any reason why the
 9 complaints -- the written complaints that are
 10 listed by Mr. Grace in his report would not have
 11 been available to the underwriters as part of
 12 their due diligence investigation if they had
 13 asked to see them?
 14 MR. GLUCKOW: Objection to the
 15 form. It assumes facts not in
 16 evidence.
 17 You can answer.
 18 THE WITNESS: I don't know why it
 19 wouldn't have been available had they
 20 asked to see them.
 21 BY MR. LEWIS:
 22 Q. You don't know why it wouldn't
 23 have been?
 24 A. Correct.
 25 Q. Do you have any knowledge, as

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1 EDWARD NECARSULMER, III
 2 you sit here, that the underwriters contacted,
 3 as part of the due diligence investigation, any
 4 of the retailers who made the complaints about
 5 Costco that are listed between the dates of
 6 March 23, 1998, and July 8, 1998?
 7 MR. GLUCKOW: Objection to the
 8 form. Are you asking him to compare
 9 this list of complaints with the list
 10 of customer calls that we've looked at
 11 previously?
 12 MR. LEWIS: Sure, if you want to;
 13 but none of them were on the list of
 14 customer calls, so I don't think he has
 15 to do that.
 16 BY MR. LEWIS:
 17 Q. Do you have any knowledge that
 18 any of the complaining retailers were contacted
 19 by Lehman Brothers or any of the comanagers
 20 during due diligence?
 21 A. I have no knowledge of that.
 22 Q. You have opined in your rebuttal
 23 report on the subject of the disclosure that was
 24 made in this case. Would you agree that in
 25 matters of disclosure that an underwriter should

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1 EDWARD NECARSULMER, III
 2 err on the side of inclusion of fact rather than
 3 exclusion of fact?
 4 MR. GLUCKOW: Objection to the
 5 characterization of the report.
 6 But you can answer.
 7 THE WITNESS: I'm not sure that's
 8 accurate. I think it's important to
 9 have a complete document, but I think
 10 part of making it a useful document,
 11 and for the benefit of the investors,
 12 is making sure that the -- the things
 13 that are -- the things that are
 14 included are, you know, significant to
 15 the company, and I think one of the --
 16 having gone through this drafting
 17 process a million times, one of the
 18 great problems is what do you put in,
 19 what do you put out, what do you leave
 20 out, and it does start -- you know, can
 21 strike likely debate, and I think
 22 striking some balance is really the
 23 goal.
 24 BY MR. LEWIS:
 25 Q. Would you agree that if by the

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1 EDWARD NECARSULMER, III
 2 time of the IPO the underwriters were unable to
 3 make a studied assessment of the scope of the
 4 risk of gray marketing that the risk of gray
 5 marketing should have been included as a risk
 6 disclosure?
 7 MR. GLUCKOW: Objection to the
 8 form. Incomplete hypothetical.
 9 Assumes facts not in evidence.
 10 You can answer.
 11 THE WITNESS: I don't agree with
 12 that. I think, again, this is a
 13 process, you make a judgment as to
 14 those things you think are significant
 15 and relevant, and those are the things
 16 you include.
 17 BY MR. LEWIS:
 18 Q. What if you concluded by the
 19 time of the effective date that you just didn't
 20 know what the scope of gray marketing was?
 21 MR. GLUCKOW: Objection. The
 22 same objections, and it
 23 mischaracterizes the evidence.
 24 THE WITNESS: My interpretation
 25 of what I read, what I reviewed, was

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1 EDWARD NECARSULMER, III
2 that they did make a judgment, and
3 their judgment was that they did know
4 enough and it was not material.
5 BY MR. LEWIS:
6 Q. When was that judgment made, to
7 the best of your knowledge?
8 A. Prior to the effective date of
9 the registration statement. I couldn't tell
10 you -- I couldn't make it any more specific than
11 that.
12 Q. Prior to the Costco press
13 release?
14 MR. GLUCKOW: Objection to the
15 form. It mischaracterizes the record.
16 It mischaracterizes the testimony.
17 You can answer.
18 BY MR. LEWIS:
19 Q. When I say the Costco press
20 release, I mean the Adams June 9, 1998, press
21 release relating to Costco.
22 A. I don't know I would make -- you
23 know, the assumption I make from the data that I
24 reviewed is that that was their conclusion.
25 Q. But are you aware of any meeting

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1 EDWARD NECARSULMER, III
2 or meetings at which that conclusion was
3 reached?
4 A. Not specifically, no.
5 Q. Are you familiar with the term
6 stickering in the context of a prospectus or
7 registration statement?
8 A. I am.
9 Q. What does that term mean to you?
10 A. You can add information via a
11 label, a long label, onto the cover of a
12 prospectus.
13 Q. And under what circumstances in
14 your opinion does one sticker a registration
15 statement or a prospectus?
16 A. Some fact coming out subsequent
17 to the printing of that prospectus that, you
18 know, you deem is material. Sometimes the SEC
19 will ask you to sticker if something comes up.
20 If effectiveness gets delayed for some reason
21 and, you know, a quarter ends or a contract gets
22 canceled or something like that, they'll often
23 allow that as a -- or recommend that as a way to
24 make sure the disclosure is complete.
25 Q. Have you seen stickering done

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1 EDWARD NECARSULMER, III
2 after the effective date of a registration
3 statement?
4 A. I would have -- I would say yes,
5 but it's more usual on the date. But it could
6 be -- it could be shortly thereafter, not long
7 thereafter.
8 Q. Are you aware of any limitation
9 to how long after the effective date a
10 prospectus can be stickered?
11 A. I'm not aware of that, if there
12 is one.
13 Q. Do you believe that's a legal
14 issue rather than a practice issue?
15 MR. GLUCKOW: Objection. It
16 calls for a legal conclusion.
17 But you can answer.
18 THE WITNESS: I don't know. I
19 don't know.
20 BY MR. LEWIS:
21 Q. Do you know if any consideration
22 was given in this case to stickering the
23 registration statement?
24 A. I don't know.
25 MR. LEWIS: Let's take a

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1 EDWARD NECARSULMER, III
2 five-minute break and I may be done.
3 (A recess was had from 3:46 p.m.
4 to 4:00 p.m.; and then the proceedings
5 continued as follows:)
6 BY MR. LEWIS:
7 Q. A point of clarification. When
8 we referred to a file memo from Joe Hoffman
9 relating to the SEC, I believe you used the term
10 signing official at the SEC?
11 A. Examining official.
12 Q. Examining?
13 A. Sorry.
14 Q. I think you actually used the
15 word sign at one point. Is that a synonym for
16 the examining official?
17 MR. GLUCKOW: I don't recall
18 those words being used, but the record
19 will speak for itself.
20 THE WITNESS: Should I respond?
21 MR. GLUCKOW: Yes, if you --
22 THE WITNESS: If I said it, I
23 didn't mean to say it. I meant to say
24 examiner.
25 BY MR. LEWIS:

44 (Pages 170 to 173)

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1 EDWARD NECARSULMER, III
 2 Q. A point of clarification. You
 3 have reached no conclusion as a result of your
 4 work in this case with respect to issuer
 5 disclosure obligations, is that fair?
 6 A. That is fair.
 7 Q. In Exhibit 321 --
 8 MR. GLUCKOW: Hold on; I've got
 9 the official copy here.
 10 MR. LEWIS: It's hopefully the
 11 last time we'll go back to it.
 12 BY MR. LEWIS:
 13 Q. -- in your enumeration of
 14 categories of things to be considered, Item 7
 15 was: "Understanding of material outstanding
 16 litigation, regulatory or environmental
 17 issues."
 18 Is it your opinion that the
 19 underwriters had any obligation to evaluate the
 20 litigation between Adams and Costco --
 21 MR. GLUCKOW: Objection to the
 22 form.
 23 BY MR. LEWIS:
 24 Q. -- for materiality?
 25 A. No. Practice is that you ask --

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1 EDWARD NECARSULMER, III
 2 you know, you ask that question of your counsel,
 3 and if they give you a clean bill of health on
 4 what you've done so far, you typically keep
 5 going.
 6 Q. "Your counsel" meaning the
 7 issuer's counsel or the underwriter's counsel?
 8 A. The underwriter's counsel.
 9 Q. Going back to Exhibit-7 to
 10 Mr. Grace's report, I take it that in the course
 11 of your --
 12 MR. GLUCKOW: Hold on, let me
 13 just get it.
 14 THE WITNESS: Got it.
 15 BY MR. LEWIS:
 16 Q. In the course of your work on
 17 this engagement, did you ever try to go through
 18 the exhibits to collect complaints related to
 19 gray marketing and line them up chronologically?
 20 A. I did not.
 21 Q. Do you have any reason to
 22 believe that the underwriters were aware of the
 23 identities of the retailers who complained to
 24 Adams about Costco's appearing -- Tight Lies
 25 appearing at Costco locations?

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1 EDWARD NECARSULMER, III
 2 A. With the exception of WDC
 3 Mackenzie, I don't.
 4 MR. LEWIS: I have no further
 5 questions at this time.
 6 MR. GLUCKOW: Okay.
 7 I'm going to have a few
 8 questions, but I just need five
 9 minutes, so if we can take a
 10 five-minute break. Is that okay?
 11 MR. LEWIS: Okay. I'll ask you
 12 what you discussed with the witness.
 13 MR. GLUCKOW: No, I'm going to
 14 sit right here. I'm not going
 15 anywhere.
 16 MR. LEWIS: Okay; fine. Take
 17 your time.
 18 MR. GLUCKOW: I just need to
 19 compare two things quickly.
 20 MR. LEWIS: Take your time.
 21 (A recess was had from 4:04 a.m.
 22 to 4:13 p.m.; and then the proceedings
 23 continued as follows:)
 24 ---

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1 EDWARD NECARSULMER, III
 2 (Whereupon, a document was
 3 marked, for identification purposes, as
 4 Exhibit 328.)
 5 ---
 6 EXAMINATION
 7 ---
 8 BY MR. GLUCKOW:
 9 Q. This is a copy of the deposition
 10 transcript of Olga Pulido-Crowe. Mr. Lewis
 11 mentioned this deposition during his examination
 12 and in fact read from it but didn't mark it,
 13 which is why I'm marking it now.
 14 Mr. Necarsulmer, let me ask you,
 15 first, do you recall reviewing
 16 Ms. Pulido-Crowe's deposition as part of your
 17 work in this matter?
 18 A. I do.
 19 Q. Did you rely on her testimony?
 20 A. Heavily.
 21 Q. Why?
 22 A. In my experience, the captain of
 23 the underwriting team takes particular weight --
 24 or deserves particular weight, I should say.
 25 Q. Let me direct your attention to

45 (Pages 174 to 177)

Page 178

1 EDWARD NECARSULMER, III
 2 the top of Page 48, Line 6.
 3 A. The top of Page 48, Line 6.
 4 Q. The question is: "Do you recall
 5 who spoke with Adams Golf about this issue?"
 6 And the answer is: "It would
 7 have been Barney or Mark -- or I don't recall
 8 exactly who, but it was a group of many people
 9 that were -- that would have been present."
 10 Do you recall reading that when
 11 you read Ms. Pulido-Crowe's deposition
 12 transcript?
 13 A. Yes.
 14 Q. Did you rely on that in any way?
 15 A. I did.
 16 Q. Why?
 17 A. Because I think it was
 18 demonstrative of the fact that there was an
 19 ongoing process of the underwriters in the
 20 company talking about this and other issues.
 21 Q. And I may have misinterpreted
 22 some of Mr. Lewis's questions earlier, but I
 23 couldn't help get the impression from some of
 24 the questions that he was asking that the
 25 impression that he was leaving on me anyway was

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1 EDWARD NECARSULMER, III
 2 that there was only one discussion between
 3 Ms. Pulido-Crowe and Mr. Adams and that that one
 4 discussion happened in April or May of '98.
 5 Is that impression that I had
 6 in my mind consistent with your review of the
 7 materials in this matter?
 8 MR. LEWIS: Objection to form.
 9 THE WITNESS: I --
 10 MR. LEWIS: You can answer.
 11 THE WITNESS: I don't know who
 12 has to tell me this in this case.
 13 Absolutely not. The one thing
 14 that is clear to me throughout, and
 15 this demonstration -- this deposition
 16 is sort of important to that, is that
 17 there was, as there normally should be
 18 in these cases, a significant number of
 19 -- amount of interaction between the
 20 company's marketing people and the
 21 underwriters.
 22 BY MR. GLUCKOW:
 23 Q. Let me turn your attention to
 24 Page 78, at the top, Line 3.
 25 MR. LEWIS: What is this?

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1 EDWARD NECARSULMER, III
 2 MR. GLUCKOW: I'm sorry, Page 78,
 3 Line 3 through Line 6.
 4 BY MR. GLUCKOW:
 5 Q. The question is: "Did you have
 6 any discussions with anyone at Adams concerning
 7 the litigation between June 9 of '98 and July 9
 8 of '98?"
 9 The answer is: "I believe we
 10 (sic) did."
 11 Line 7: "Who did you have
 12 those discussions with?"
 13 "Answer: I don't recall. I
 14 can recall conversations. I don't remember
 15 who was actually there, but I recall
 16 conversations."
 17 Did you review this?
 18 A. I did.
 19 Q. Did you rely on it?
 20 MR. LEWIS: Objection to form.
 21 Vague. Overbroad.
 22 THE WITNESS: I did rely on it.
 23 BY MR. GLUCKOW:
 24 Q. Why?
 25 A. Again, it was evidence of this

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1 EDWARD NECARSULMER, III
 2 ongoing discussion between the company and the
 3 underwriters as part of the due diligence
 4 process.
 5 Q. Let me actually have you turn
 6 back to Page 77, the prior page. I should have
 7 started here; I apologize.
 8 On Page 76, Exhibit 163 is marked
 9 -- and then there's a question -- which is the
 10 press release concerning the Costco action,
 11 which Mr. Lewis asked you about, and on top of
 12 Page 77, the question is: "Do you recall
 13 whether you saw it," meaning this press release,
 14 "prior to the IPO?"
 15 And the answer is: "Yes."
 16 Skipping down to Line 14, the
 17 question is: "Did you discuss the litigation
 18 with anyone at Adams prior to them filing
 19 suit?"
 20 The answer is, on Line 16: "I
 21 believe it was prior, yes."
 22 17. "Who did you discuss this
 23 with?"
 24 18. "Answer: I don't recall
 25 exactly, but it would have -- it was a group

46 (Pages 178 to 181)

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1 EDWARD NECARSULMER, III
2 of senior management at the company and/or our
3 counsel, underwriters' counsel or their
4 counsel. It was discussed."

5 Do you see what I've just read
6 there?

7 A. I do.

8 Q. Did you read that as part of
9 your evaluation of this matter?

10 A. I did.

11 Q. Did you rely on what I've just
12 read?

13 MR. LEWIS: Objection.

14 THE WITNESS: I did.

15 BY MR. GLUCKOW:

16 Q. Please explain how and why.

17 A. I relied on it because, again, I
18 was -- one of the things I was trying to
19 investigate as part of my project was, you know,
20 were the underwriters thorough and consistent in
21 trying to discuss, you know, these -- the
22 marketing issues, the distribution issues, legal
23 issues, with the company, and this is another
24 evidence that they did and that they followed up
25 on it.

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1 EDWARD NECARSULMER, III
2 Q. There are a number of documents
3 that Mr. Lewis showed you -- examples would be
4 the Lehman Brothers Commitment Committee
5 memorandum, Exhibit 74; the due diligence
6 memorandum, Exhibit 160, also marked as 198; the
7 notes of the bringdown diligence discussion,
8 Exhibit 159 -- where the questioning pointed out
9 that there was no reference in those documents
10 and other documents to gray marketing or Costco.

11 Do you recall that line of
12 questioning?

13 A. I do.

14 Q. Did it surprise you in any way
15 that there was no reference to gray marketing or
16 Costco in those documents?

17 MR. LEWIS: Objection. Vague and
18 overbroad.

19 THE WITNESS: It didn't surprise
20 me at all.

21 BY MR. GLUCKOW:

22 Q. Why?

23 A. Because the underwriters had
24 made a determination that this was not
25 significant to the company's sales and earnings;

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1 EDWARD NECARSULMER, III
2 therefore, like many other issues, it just
3 wasn't part of the conversation.

4 MR. GLUCKOW: I have no further
5 questions at this time.

6 MS. MORIATY: I've got just a
7 few.

8 THE WITNESS: Sure.

9 ---

10 EXAMINATION

11 ---

12 BY MS. MORIATY:

13 Q. I want to turn everybody back to
14 Exhibit I think it's 327 which was the exhibit
15 to Mr. Grace's report.

16 MR. GLUCKOW: Here it is.

17 THE WITNESS: Okay.

18 BY MS. MORIATY:

19 Q. Well done, okay.

20 During your research for your
21 report in this case, did you learn how many
22 retailers Adams Golf had in 1998?

23 A. The number 7,000 sticks in my
24 mind.

25 Q. Do you know how many phone calls

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1 EDWARD NECARSULMER, III
2 Adams Golf received to its call center in total
3 between about January 1st and July 8 of 1998?

4 MR. LEWIS: Objection to form.

5 THE WITNESS: A thousand -- I --

6 BY MS. MORIATY:

7 Q. Did you read this information in
8 the course of your research for this report?

9 A. Yes.

10 MR. LEWIS: Objection to form.

11 THE WITNESS: Yes, I did.

12 BY MS. MORIATY:

13 Q. I'm going to represent to you
14 that -- you just told me it was 7,000
15 retailers.

16 A. Right.

17 Q. I'm going to represent to you
18 that they had 12,885 calls to this call center.
19 You can believe that or not. Based on whatever
20 impression you had during your research, based
21 on that.

22 So I'm going to look at Exhibit
23 327. And we discussed earlier the complaints
24 to Adams Golf regarding the Costco column, and
25 in this column by my count there are 12

47 (Pages 182 to 185)

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1 EDWARD NECARSULMER, III
2 retailers complaining between the beginning of
3 this chart and the IPO -- the beginning of
4 this chart starts February 16th, '98; and
5 there are nine calls that come into the call
6 center.

7 So with all of your experience
8 working as an underwriter in various IPOs, and
9 in light of the information in Exhibit 327 and
10 the number of retailers -- 7,000 -- and calls
11 to the call center -- upwards of 12,000 -- do
12 you think gray marketing should have been
13 listed as a risk factor in the Adams Golf
14 prospectus?

15 MR. LEWIS: Objection to form and
16 foundation.

17 MR. GLUCKOW: I'll just --

18 MR. LEWIS: Beyond the scope of
19 his purpose in this litigation
20 according to his testimony.

21 THE WITNESS: Should I answer?

22 MR. LEWIS: You may answer, if
23 you can.

24 THE WITNESS: I mean, it seems to
25 me, again, as I just answered

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1 EDWARD NECARSULMER, III
2 Mr. Gluckow, they made a determination
3 that while they knew of the issue, that
4 it simply wasn't -- didn't rise to the
5 level of, and I would rather use the
6 word significant than material because
7 I think material actually has a legal
8 connotation, also. So, therefore, like
9 many other issues, they made the
10 determination, the underwriters made
11 the determination, that there was no
12 benefit, no reason, you know, to take
13 it any further. And that's a judgment
14 you make when you are an underwriter,
15 when you do due diligence. There are
16 lots of factors to consider; you just
17 -- you make these decisions.

18 BY MS. MORIATY:

19 Q. If you as an underwriter heard
20 that 12 retailers out of 7,000 complained, would
21 you think that this is a significant issue?

22 MR. LEWIS: Objection to form.

23 THE WITNESS: I would think that
24 it would be less than I would have
25 guessed the normal sample would be, so

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1 EDWARD NECARSULMER, III
2 I think it would not be a significant
3 issue.

4 BY MS. MORIATY:

5 Q. And if you heard that nine calls
6 out of more than 12,000 were regarding a certain
7 issue, would you have thought that issue
8 significant enough to investigate further or put
9 as a risk factor?

10 MR. LEWIS: Objection to form and
11 foundation.

12 THE WITNESS: It's hard to, you
13 know -- no, the answer is no, the
14 numbers are simply too small, putting
15 myself in that spot.

16 MS. MORIATY: Thanks. No further
17 questions here.

18 ---

19 EXAMINATION

20 ---

21 BY MR. LEWIS:

22 Q. Mr. Necarsulmer, can you say
23 that as someone who is overseeing due diligence
24 investigations in the past if you had
25 Mr. Grace's report before you at the time of the

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1 EDWARD NECARSULMER, III
2 IP -- just before the IPO was effective and saw
3 that Adams' clubs were appearing in Costco
4 warehouses in diverse locations in the country,
5 that that was something you wouldn't have asked
6 some questions about?

7 MR. GLUCKOW: Objection to form.
8 Incomplete hypothetical.
9 Mischaracterizes the record.

10 You can answer.

11 THE WITNESS: I mean, you know,
12 it's very hard to look back, but I
13 again think that -- I again think that
14 you -- the judgment -- I keep going
15 back -- the totality of this, it is my
16 opinion, and I certainly believe it,
17 that they made an informed -- given all
18 the facts that they knew, they made a
19 reasonable judgment that it was not --
20 did not rise to the level of being a
21 risk factor.

22 BY MR. LEWIS:

23 Q. The underwriters could have kept
24 the offering from going forward any time up to
25 the effective date, could they not, if they were

48 (Pages 186 to 189)

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1 EDWARD NECARSULMER, III
2 not satisfied as to -- that all proper
3 disclosures were being made?

4 MR. GLUCKOW: Incomplete
5 hypothetical. Assumes facts not in
6 evidence.

7 You can answer.

8 THE WITNESS: Sure; you can even
9 do it after the effective date.

10 BY MR. LEWIS:

11 Q. How late after the effective
12 date can you do it?

13 MR. GLUCKOW: It calls for a
14 legal conclusion.

15 BY MR. LEWIS:

16 Q. In your understanding, to the
17 best of your knowledge, how late after the
18 effective date can you stop an underwriting?

19 MR. GLUCKOW: The same
20 objections.

21 THE WITNESS: I don't remember --
22 I don't know if it's 30 or 40. There's
23 a number, I just don't know what it is,
24 or I don't remember what it is, and it
25 may have changed since I was actively

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1 EDWARD NECARSULMER, III
2 doing this. I thought there was some
3 sort of -- I don't remember. The
4 answer is I don't remember whether it's
5 30 days or 45 days or whether it's even
6 a specific number any longer, but...

7 MR. LEWIS: Nothing further.

8 MR. GLUCKOW: Nothing further.

9 MS. MORIATY: No. Good.

10 MR. GLUCKOW: Thank you very
11 much.

12 (Deposition concluded at
13 4:26 p.m.)

14 -O-

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1 CERTIFICATE

2 I, Pamela Harrison, a Notary
3 Public, do hereby certify:

4 That EDWARD NECARSULMER, the
5 witness whose testimony is hereinbefore set
6 forth, was duly sworn by me and that such
7 testimony given by the witness was taken down
8 stenographically by me and then transcribed.

9 I further certify that I am not
10 related to any of the parties to this
11 action by blood or marriage, and that I am in
12 no way interested in the outcome of this
13 matter.
14

15
16
17 Pamela Harrison
18 Registered Merit Reporter
19 Certified Realtime Reporter
20 CSR-NJ # 30XI00221600
21 Notary Public
22 Date: August 8, 2006

23 (The foregoing certification of
24 this transcript does not apply to any
reproduction of the same by any means, unless
under the direct control and/or supervision of
the certifying shorthand
reporter.)

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1 INSTRUCTIONS TO WITNESS

2 Please read your deposition
3 over carefully and make any necessary
4 corrections. You should state the reason in
5 the appropriate space on the errata sheet for
6 any corrections that are made.

7 After doing so, please sign the
8 errata sheet and date it.

9 You are signing same subject to
10 the changes you have noted on the errata sheet,
11 which will be attached to your deposition.

12 It is imperative that you return
13 the original errata sheet to the deposing
14 attorney within thirty (30) days of receipt of
15 the deposition transcript by you. If you fail
16 to do so, the deposition transcript may be
17 deemed to be accurate and may be used in court.
18
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ERRATA

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ACKNOWLEDGMENT OF DEPONENT

I, _____, hereby certify that I have read the foregoing pages ____ to ____ and that the same is a correct transcription of the answers given by me to the questions therein propounded, except for the corrections or changes in form or substance, if any, noted in the attached Errata Sheet.

DATE _____ SIGNATURE _____

Subscribed and sworn to before me this _____ day of _____, 200_.

My commission expires: _____

Notary Public